Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

Hecla Mining Company,

Petitioner,

v.

Washington Wilderness Coalition, Okanogan Highlands Alliance, and Atlantic States Legal Foundation, Inc.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Ninth Circuit's rule improperly limit a district court's discretion in determining whether it is appropriate to award attorney's fees to a prevailing defendant in a citizen suit brought under the Federal Water Pollution Control Act ("Clean Water Act") and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA")?

LIST OF PARTIES AND RULE 29.6 STATEMENT

All of the parties to the appeal in the United States Court of Appeals for the Ninth Circuit are listed in the caption.

Pursuant to Sup. Ct. R. 29.6, petitioner has no parent company. Following are petitioner's non wholly owned subsidiaries:

ConSil Corp.

Minera ConSil S.A. de C.V. (wholly-owned subsidiary of ConSil Corp.)

Moonlight Mining Company

Nine Corporation

The Rosebud Mining Company, L.L.C.

Silver Mountain Lead Mines, Inc.

Wall Street Mining Company

TABLE OF CONTENTS

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. The Facts Material To This Court's Consideration of the Question Presented 5

B. Proceedings Below 7

REASONS FOR GRANTING THE WRIT 9

I. THE NINTH CIRCUIT'S ATTEMPT TO RESTRICT THE DISTRICT COURT'S DISCRETION TO AWARD ATTORNEY FEES TO PREVAILING DEFENDANTS IN CLEAN WATER ACT AND CERCLA CITIZEN SUITS CONFLICTS WITH THE PLAIN LANGUAGE OF THE STATUTES AND FINDS NO SUPPORT IN LEGISLATIVE HISTORY 10

A. The Clear Language of the Statutes Dictates that District Courts Have Discretion in Awarding Attorney Fees to Prevailing Defendants. 10

B. The Legislative History of the Clean Water Act and CERCLA Supports an Interpretation that is Consistent with the Plain Language of the Statutes. 13

II. THE NINTH CIRCUIT'S IMPORTATION OF A STANDARD EMPLOYED IN CIVIL RIGHTS CASES INTO THE REALM OF ENVIRONMENTAL CITIZEN SUITS IS INAPPROPRIATE BECAUSE OF CLEAR DIFFERENCES IN THE PURPOSES OF THE STATUTES AND IN THE EQUITIES OF CITIZEN SUITS BROUGHT PURSUANT TO THE STATUTES. 15

A. The Goals of Civil Rights and Environmental Statutes Differ. 16

B. The Equities of Citizen Suits Brought Pursuant to the Statutes Differ. 20

III. THIS COURT SHOULD GRANT THIS PETITION TO ADDRESS THE PROBLEM OF THE LOWER COURTS APPLYING DISPARATE STANDARDS IN AWARDING ATTORNEY FEES TO DEFENDANTS IN ENVIRONMENTAL CITIZEN SUITS. 23

CONCLUSION 25

TABLE OF CITED AUTHORITIES

Cases

Atlantic States Legal Found. v. United Musical Instruments, 61 F.3d 473 (6th Cir. 1995) 19

Chartrand v. Chrysler Corp., 785 F. Supp. 666 (E.D. Mich. 1992) 21, 24

Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) 15, 17, 21, 22

Consolidated Edison Co. v. Realty Investments Assocs., 524 F. Supp. 150 (S.D.N.Y. 1981) 21, 23

Environmental Compliance Oversight Corp. v. SmithKline Beecham Corp., Civ. A. No. 94-1807, 1994 WL 675297, (E.D. Pa. Nov. 21, 1994) 24

Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994) 11, 17, 20

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49 (1987) 4, 17-19

Hallstrom v. Tillamook County, 493 U.S. 20 (1989) 17, 19, 20, 22

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) 10

National Wildlife Fed. v. Consumers Power Co., 729 F. Supp. 62 (W.D. Mich. 1989) 24

Newman v. Piggie Park Enter.,
390 U.S. 400 (1968) 17, 22

Painewebber Income Props. Three Ltd. Partnership
v. Mobil Oil Corp., 916 F. Supp. 1239
(M.D. Fla. 1996) 21, 24

Pape v. Manistique Papers, Inc.,
114 F.3d 1188 (6th Cir. 1997) 23

Pavelic & LeFlore v. Marvel Entertainment Group,
493 U.S. 120 (1989) 12

Razore v. Tulalip Tribes of Washington,
66 F.3d 236, 240 (9th Cir. 1995) 3, 5, 8, 9, 15

Sierra Club v. Shell Oil Co.,
817 F.2d 1169 (5th Cir. 1987) 23

Sullivan v. Stroop,
496 U.S. 478 (1990) 10

Truck Components Inc. v. Beatrice Co.,
No. 94 C 3228, 1996 WL 462520,
(N.D. Ill. July 15, 1996) 24

United States v. American Trucking Ass'ns,
310 U.S. 534 (1940) 10

United States v. Lanier,
117 S.Ct. 1219 (1997) 10, 11

United States v. Ron Pair Enter., Inc.,
489 U.S. 235 (1989) 10

Washington Trout v. Scab Rock Feeders,
823 F. Supp. 819 (E.D. Wash. 1993) 24

Statutes, Regulations and Rules

15 U.S.C. § 15(c) 11

15 U.S.C. § 1692(k) 11

33 U.S.C. § 1342 ..... 5, 16

42 U.S.C. § 11113 12

42 U.S.C. § 9613(h) 18

49 U.S.C. § 60121 11

Administrative Procedure Act, 5 U.S.C. § 552(b) 12

Clean Air Act, 42 U.S.C. § 7604 3

Clean Water Act, 33 U.S.C. §1365 ..... 1, 3, 9, 11, 18, 19

Comprehensive Environmental Response,
Compensation, and Liability Act of
1980, 42 U.S.C. § 9659 ..... 2, 3, 9, 11, 18, 19

Emergency Planning and Community
Right-To-Know Act, 42 U.S.C. § 11046 3

Endangered Species Act, 16 U.S.C. § 1540(g) 3

Latham Act, 15 U.S.C. § 1117(a) 12

Noise Control Act, 42 U.S.C. § 4911 3

Patent Act, 35 U.S.C. § 285 12

Solid Waste Disposal Act, 42 U.S.C. § 6972 3

Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270 3

Other Authorities

Conference Report No. 92-1236 (September 28, 1972), reprinted in 1972 U.S. Code Cong. & Admin. News 3776 13

H.R. Rep. No. 92-911 (March 11, 1972), reprinted in 1 Legislative History of the Water Pollution Control Act Amendments of 1972 13

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Stephen G. Allen, Environmental Bounty Hunters: Reallocating Enforcement Authority Between Citizens and the Government Under the Clean Water Act, 5 Journal of Min. L. & Policy 257 (1989-90) 2

Walter B. Russell, III & Paul Thomas Gregory, Awards of Attorney's Fees in Environmental Litigation: Citizen Suits and the "Appropriate" Standard, 18 Ga. L. Rev. 307 (1984) 4, 18

PETITION FOR A WRIT OF CERTIORARI

Petitioner Hecla Mining Company ("Hecla") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this matter.

OPINIONS BELOW

The Court of Appeals' panel decision (App. A), dated August 4, 1998, is unreported. The District Court's order dismissing all claims against Hecla (App. B), dated May 6, 1997, is unreported. The District Court's order denying Hecla's motion for attorney fees (App. C), dated July 9, 1997 is unreported.

JURISDICTION

The Court of Appeals' panel decision of which review is sought was rendered in an opinion filed on August 6, 1998 (App. A). This Court has jurisdiction to review the judgment of the court of appeals by writ of certiorari pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The Clean Water Act citizen suit provision, 33 U.S.C. §1365(d), provides in relevant part:

> The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party,

> whenever the court determines such award is appropriate.

The CERCLA citizen suit provision, 42 U.S.C. § 9659(f), provides in relevant part:

> The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate.

STATEMENT OF THE CASE

The number of citizen suits brought under the Federal environmental laws has sharply increased over the past several years.[1/] Across the country, professional litigators have discovered the citizen suit provisions contained in these statutes, and are dedicating their practices to environmental litigation. This explosion in environmental litigation has been driven in no small part by the provisions contained in most environmental

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1/ Between 1978 and 1983, potential plaintiffs nationwide filed a total of 41 notices of intent to sue under the Clean Water Act citizen suit provision; in 1983 and 1984, a total of 195 notices of intent were filed; between 1984 and 1987, 800 notices of intent were filed. Stephen G. Allen, Environmental Bounty Hunters: Reallocating Enforcement Authority Between Citizens and the Government Under the Clean Water Act, 5 Journal of Min. L. & Policy 257 (1989-90). This "explosion" of citizen suits has continued through the 1990s. Ross Macfarlane & Lori Terry, Citizen Suits: Impacts on Permitting and Agency Enforcement, 11-SPG Nat. Resources & Env't. 20, 20 (Spring 1997).

citizen suit statutes that allow a prevailing party to recover its costs and attorney fees.[2/] While much attention has been paid to the standards under which a prevailing plaintiff may recover its attorney fees under these provisions, the lower courts have been unable to reach a consensus as to what standards should govern an award of attorney fees to a prevailing defendant.

Here, the Ninth Circuit panel ruled, without any analysis, that the district courts may not award attorney fees to a party who has successfully defended a Clean Water Act or CERCLA citizen suit unless the defendant shows that the plaintiff's claims were "frivolous, unreasonable, or without foundation." App. A, at 3a-4a (citing standard created in Razore v. Tulalip Tribes of Washington, 66 F.3d 236, 240 (9th Cir. 1995)). That decision is wholly at odds with the clear statutory language contained in these statutes, is not premised on any supportable legal analysis, and is a clear example of judicial legislating that should be corrected by this Court. The Ninth Circuit standard arbitrarily restricts the significant discretion that Congress expressly vested in the district courts

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2/ Beginning in the 1970s, Congress began inserting into nearly every new federal environmental statute a provision authorizing citizens to sue to enforce the statute in the event the agency entrusted with enforcement of the statute failed to enforce it adequately. Many of these statutes include fee-shifting provisions which, like the Clean Water Act and CERCLA provisions at issue in this case, allow either the "prevailing party" or "any party" to recover its fees in "appropriate" circumstances. See, e.g., Clean Air Act, 42 U.S.C. § 7604 (any party); Emergency Planning and Community Right-To-Know Act, 42 U.S.C. § 11046 (prevailing party); Noise Control Act, 42 U.S.C. § 4911 (any party); Endangered Species Act, 16 U.S.C. § 1540(g) (any party); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270 (any party); Solid Waste Disposal Act, 42 U.S.C. § 6972 (prevailing party); Clean Water Act, 33 U.S.C. § 1365 (prevailing party); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9659 (prevailing party).

to determine when a fee award to a prevailing party is "appropriate." Courts in other circuits have struggled in this muddied area of the law and have inconsistently applied various standards that disfavor fee awards to defendants or, in contrast, apply a more even-handed approach to awarding fees to the prevailing party.[3/]

Over the past years, citizen suits — originally envisioned as a limited means of protecting the public interest by enforcing federal environmental laws only when the responsible agencies failed to do so[4/] — have evolved into an aggressive litigation tool used by a variety of plaintiffs to achieve a variety of goals — some of which are entirely unrelated to environmental protection or the public interest.[5/] Consequently, as the number of citizen suits has escalated, the equities involved in the suits have not followed a bright line, and the lower courts have struggled in trying to define the appropriate standards for fee awards. The Ninth Circuit has decided to apply a "frivolous, unreasonable, or without foundation" standard to substantially restrict a prevailing defendant's ability to recover fees, regardless of the equities at issue in a particular case. See

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3/ See infra Section III.

4/ See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 60 (1987); Walter B. Russell, III & Paul Thomas Gregory, Awards of Attorney's Fees in Environmental Litigation: Citizen Suits and the "Appropriate" Standard, 18 Ga. L. Rev. 307, 308-09 (1984).

5/ One reason for this proliferation of suits is an entire cottage industry of lawyers specializing in locating potential citizen suit plaintiffs and prosecuting their suits. See Ross Macfarlane & Lori Terry, supra note 1, at 21. This development has reduced the public interest justification for many citizen suits.

Razore, 66 F.3d at 240. Unfortunately, this standard is legally unfounded and arbitrary.

This case presents the opportunity to correct the Ninth Circuit's improper restriction of the district courts' discretion to award attorney fees to prevailing defendants in Clean Water Act and CERCLA citizen suits, and to clarify this important area of the law. Since many of the federal environmental statutes contain similar fee-recovery language, this Court's review of the Ninth Circuit's decision would also provide much needed guidance to the lower courts in assessing attorney fee requests in the ever-increasing numbers of citizen suits brought under these laws.[6/]

A. The Facts Material To This Court's Consideration of the Question Presented

In 1981, Hecla Mining Company ('Hecla") acquired a mine near Republic, Washington that had produced gold and silver since the turn of the century (the "Republic Unit"). App. B, at 4. Over the years, ore tailings and wastewater from the mine were disposed in surface impoundments, or "tailings ponds," located on the mine property. App. B, at 8a-9a. The State of Washington has been delegated authority to implement the permitting provisions of the Clean Water Act, including Section 402 of the Clean Water Act, which authorizes the issuance of National Pollutant Discharge Elimination System ("NPDES") permits for discharges of pollutants to navigable waters. 33 U.S.C. § 1342. The previous owner of the Republic Unit had maintained waste discharge permits, issued by the State of Washington which authorized the discharge of a certain amount of wastewater from the only active tailing pond, known

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[6/] See supra note 1.

as the Aspen Pond, to surface and groundwater.[7/] App. B, at 10a.

In 1994, Hecla obtained a new permit from the Washington State Department of Ecology ("DOE"). This was a "zero discharge" permit, which provided that Hecla could not discharge any wastewater from the Aspen Pond. App. B, at 11a. To achieve this zero discharge standard, the permit established a schedule for decommissioning Aspen Pond and for building a replacement tailings pond that would employ modern technology designed to eliminate seepage. App. B, at 11a-12a. Seep collection wells were installed to collect seepage and pump it back to the pond. The DOE knew that a certain amount of wastewater was seeping from the Aspen Pond, as it had in the past issued permits expressly authorizing that discharge. App. B, at 11a. The DOE also understood that it would take time to eliminate all seepage from the historic tailings pond. App. B, at 11a-13a. Consequently, as long as Hecla complied with the closure schedule, DOE would deem it to be in compliance with the "zero discharge" requirement of the new permit. App. B, at 13a. While Hecla's permit contained the strictest discharge limitation possible — zero discharge— this new permit was not labeled an NPDES permit because, as a matter of policy, the DOE does not issue NPDES permits for discharges to groundwater, and the seepage from Aspen Pond was not discharging directly to surface waters. App. B, at 11a.

7/ The Aspen Pond was constructed in the 1950's. One early permit, issued in 1971, authorized discharge either to groundwater or directly into Eureka Creek, which passes through the Republic Unit; however, a later permit authorized discharge only to groundwater.

B. Proceedings Below

In 1994 three environmental groups filed suit against Hecla seeking penalties and injunctive relief for alleged violations of the Clean Water Act and CERCLA. The groups claimed that Hecla was violating the Clean Water Act because the company was discharging water from the Aspen Pond, and two other historic tailings areas on the Republic Unit property without an NPDES permit. App. B, at 2a. The groups premised their CERCLA claim on the theory that Hecla had failed to report to the National Response Center the release of a reportable quantity of a hazardous substance. App. B, at 2a. On the eve of trial, the environmental groups voluntarily dismissed their CERCLA claim, and also their prayer for injunctive relief. App. B, at 2a.

During the trial, the plaintiffs attempted to show that seepage from tailings ponds on Hecla's Republic Unit constituted a discharge into navigable waters, and that therefore, the DOE should have issued a permit to Hecla labeled an NPDES permit, rather than a wastewater discharge permit. After trial to an advisory jury, the district court dismissed the plaintiffs' remaining Clean Water Act claim for lack of standing. App. B, at 35a. The court held that the plaintiffs had not proved injury to any interest, either environmental, recreational, or health-based. For example, the court stated:

> This was not Silent Spring. There was no evidence that any living being even sustained inconvenience, let alone injury. There were no bloated fish floating belly-up, no featherless birds, no smells, no defoliation, no loss of habitat and no loss of aesthetics.

App. B, at 18a-19a. The court found that there was no evidence that "there should have been or even might have been" harm to fish and wildlife. App. B, at 19a. With respect to human health risks, again, neither the court nor the jury found evidence of harm. As the court stated: "The jury did not see Hecla's discharges as harmful. As one member of the jury put it, 'you could still drink the water out of Mud Lake or Eureka Creek and not perish from it.' " App. B, at 20a.

The district court found that the environmental groups' case was premised on a purely technical violation of the Clean Water Act. App. B, at 21a. The court further found that, even if the environmental groups had prevailed, the environment would not have benefitted because the plaintiffs had dropped their claim for injunctive relief, and the DOE had already required Hecla to close its facility and meet a strict compliance schedule for satisfying the "zero discharge" standard under its permit. App. C, at 38a-39a. As the district court stated, "The point of this suit was not to close Aspen Pond and save the environment. DOE had already done that." App. C, at 39a.

After the district court's dismissal of plaintiffs' Clean Water Act claim, Hecla moved for costs and fees. The court awarded Hecla costs as the prevailing party under Federal Rule of Civil Procedure 54(d)(1). App. C, at 48a, 51a. However, rather than exercising its discretion to determine whether the award of attorney fees to Hecla would be "appropriate" in this case, as directed by the Clean Water Act and CERCLA citizen suit provisions, the district court denied Hecla's motion for attorney fees outright based on untenable Ninth Circuit precedent. App. C, at 40a-41a, 45a-46a. The district court held that it was bound by the Ninth Circuit's decision in Razore v. Tulalip Tribes of Washington, 66 F.3d 236 (9th Cir. 1995), which prohibits district courts from awarding attorney fees to a prevailing defendant in a Clean Water Act citizen suit, unless

the defendant shows the plaintiff's action was "frivolous, unreasonable, or without foundation." App. C, at 40a-41a (citing Razore, 66 F3d at 240). The district court further surmised, "it is probable the Ninth Circuit would apply the same analysis [to the CERCLA citizen suit provision] as it did in Razore." App. C, at 45a-46a. Without any analysis, the Ninth Circuit affirmed the district court's ruling, citing its decision in Razore as controlling. App. A, at 3a-4a.

REASONS FOR GRANTING THE WRIT

The plain language of the Clean Water Act and CERCLA citizen suit provisions clearly provide for recovery of attorney fees by any prevailing party, whenever the district court deems it "appropriate." 33 U.S.C. § 1365(d); 42 U.S.C. § 9659(f). There exists no sound legal justification for substantially limiting the district court's discretion to determine when it is "appropriate" for a prevailing defendant to recover its attorney fees as the Ninth Circuit has done. The Ninth Circuit's automatic prohibition on the award of attorney fees to prevailing defendants absent a showing that the plaintiff's claims are "frivolous, unreasonable, or without foundation" is untenable, and should be rejected by this Court in favor of an approach that allows the federal district courts to evaluate all of the circumstances of a case before it.

I. THE NINTH CIRCUIT'S ATTEMPT TO RESTRICT THE DISTRICT COURT'S DISCRETION TO AWARD ATTORNEY FEES TO PREVAILING DEFENDANTS IN CLEAN WATER ACT AND CERCLA CITIZEN SUITS CONFLICTS WITH THE PLAIN LANGUAGE OF THE STATUTES AND FINDS NO SUPPORT IN LEGISLATIVE HISTORY.

A. The Clear Language of the Statutes Dictates that District Courts Have Discretion in Awarding Attorney Fees to Prevailing Defendants.

It has long been established by this Court that in interpreting a statute, the plain language of the statute controls. If the language of a statute is clear and unambiguous, "that is the end of the matter": the Court should look no further than that language in determining a statute's meaning. Sullivan v. Stroop, 496 U.S. 478, 482 (1990); United States v. Ron Pair Enter., Inc., 489 U.S. 235, 241 (1989). This is true unless the plain meaning of the statute would lead to "absurd or futile results," United States v. American Trucking Ass'ns, 310 U.S. 534, 543 (1940), or unless there is a "clearly expressed legislative intention contrary to that language." INS v. Cardoza-Fonseca, 480 U.S. 421, 432 n.12 (1987). This "plain meaning" rule is based on the truism that in the vast majority of its legislation Congress does mean what it says and thus the statutory language is normally the best evidence of congressional intent. United States v. Lanier, 117 S.Ct. 1219, 1226 (1997).

The fee-shifting provisions of the Clean Water Act and CERCLA unambiguously state that "the court . . . may award

costs of litigation (including reasonable attorney and expert witness fees)" to a "prevailing or substantially prevailing party" whenever the court determines that such an award is "appropriate." 33 U.S.C. §1365(d); 42 U.S.C. §9659(f). Nowhere do these provisions suggest that prevailing plaintiffs are automatically to be treated differently from prevailing defendants. Rather, the statutes adopt a single discretionary standard which applies to the "prevailing party," regardless of whether that party is a plaintiff or defendant. Congress did not impose any rigid limitations on a district court's discretion to award costs. Litigation costs "may" be awarded "whenever" the court determines that such an award is appropriate. Id. (emphasis added). By using these terms, Congress unequivocally granted the district courts discretion to award litigation costs to either party whenever they decide such an award is appropriate, based on the particular facts of the case before it. Fogerty v. Fantasy, Inc., 510 U.S. 517, 533 (1994) (the use of the term "may" in a statute "clearly connotes discretion").

Indeed, it is difficult to imagine how Congress could have been more explicit in granting broad discretionary authority to the district courts. Other statutes show that Congress knows how to impose limitations upon judicial discretion to award fees to a prevailing defendant when it so chooses. In fact, in the Pipeline Safety Act of 1992, Congress included essentially the same standard the Ninth Circuit is impermissibly trying to "legislate" here. The Act reads: "The court may award costs, reasonable expert witness fees, and a reasonable attorney's fee to a prevailing plaintiff in a civil action under this section. The court may award costs to a prevailing defendant when the action is unreasonable, frivolous, or meritless." 49 U.S.C. § 60121. See also 15 U.S.C. § 15(c) (similar dual standard in restraint of trade statute); 15 U.S.C. § 1692(k) (similar dual standard in debt collection statute). Thus,

it is clear that, when Congress intends to establish rigid dual standards for attorney fee recovery, it can expressly do so.

Congress has clearly indicated when it intended to subject prevailing defendants to a more onerous standard in seeking cost awards in cases brought to enforce several other federal statutes. For example, Section 552b(i) of the Administrative Procedure Act, 5 U.S.C. § 552(b), expressly provides that litigation costs may be assessed in favor of the substantially prevailing party, "except that costs may be assessed against the plaintiff only where the court finds that the suit was initiated by the plaintiff primarily for frivolous or dilatory purposes." 5 U.S.C. § 552b(i). Compare 42 U.S.C. § 11113 (in suit brought relating to professional review activities, defendant who "substantially prevailed" entitled to attorney fees if the claim was "frivolous, unreasonable, without foundation, or in bad faith"). See also the Latham Act, 15 U.S.C. § 1117(a), and the Patent Act, 35 U.S.C. § 285 (both stating that "[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party"). The obvious corollary is: when Congress intends to vest the trial court with discretion to determine when a fee award is appropriate to either party, it can do so. It has done so in the citizen suit authorization contained in the Clean Water Act.

In interpreting statutory language, a court's task is to "apply the text, not to improve upon it." Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 126 (1989). Because the fee-shifting provisions of the Clean Water Act and CERCLA unambiguously grant the district court broad discretion to award litigation costs to a prevailing party "whenever the court determines that such an award is appropriate," it is wrong for the Ninth Circuit to adopt its own rule narrowly limiting that discretion to significantly restrict the

circumstances under which a prevailing defendant may recover its fees.

B. The Legislative History of the Clean Water Act and CERCLA Supports an Interpretation that is Consistent with the Plain Language of the Statutes.

As discussed above, the plain language of the fee-shifting provisions in the Clean Water Act and CERCLA should govern unless that language leads to absurd or impracticable consequences, or there is a clearly expressed legislative intent to the contrary. Certainly allowing the district courts discretion to make fact-specific determinations as to whether to award litigation costs in a particular case does not implicate the "absurd or impracticable consequences" exception to the plain language rule. Moreover, there is no "clearly expressed legislative intention" to justify deviating from the statutory language. Rather, the legislative history of the Clean Water Act and CERCLA fully supports the vesting of discretion in the district courts to determine when a fee award to a prevailing defendant is "appropriate" given the facts and equities of a particular case.

For example, just six days before the 1972 Clean Water Act Amendments were passed, the fee-shifting provision of the Clean Water Act was discussed in the Joint Explanatory Statement of the Committee of Conference ("Joint Explanatory Statement"), authored by members of both the House and Senate. The Joint Explanatory Statement provides only that "[l]itigation costs may be awarded to any party if a court determines that such an award is appropriate." Conference Report No. 92-1236 (September 28, 1972), reprinted in 1972 U.S. Code Cong. & Admin. News 3776, 3823. See also H.R. Rep. No. 92-911 (March 11, 1972), reprinted in 1 Legislative

History of the Water Pollution Control Act Amendments of 1972. See also, H.R. Rep. No. 99-253(V), 99th Cong., 1st Sess. (1985) (Superfund Amendments and Reauthorization Act of 1986, amendment to CERCLA) (stating that the fee-shifting provision allows the district court to "award costs of litigation, including reasonable attorney and expert witness fees, to the prevailing or substantially prevailing party whenever the court determines such an award is appropriate").

The decision to make attorney fee awards available to either party at the discretion of the district court was a measured and considered one. The Clean Water Act citizen suit provision originally mandated that all successful plaintiffs receive litigation costs; this language was excised by the Committee prior to passage of the Act and replaced with language allowing any prevailing party to recover fees. S. Rep. No. 414, 92d Cong., 1st Sess. 81 (1971), reprinted in 1972 U.S. Code Cong. & Amin. News 3668, 3757. In short, rigid rules governing the recovery of fees were rejected.

There is simply no indication in the legislative history that Congress intended to place limitations on the district court's discretion in determining whether an award of attorney fees is appropriate. Rather, the language suggests that a district court's determination of whether to award costs should be driven by broad public interest considerations. While defendants should be entitled to an award of litigation costs (including attorney fees and expert witness fees) in defending actions that were frivolous or harassing, such cases do not constitute the exclusive list of circumstances under which Congress determined that an award of costs may be appropriate. Rather, such cases are simply one obvious example of when a litigation cost award would be in the public interest. See, e.g., S. Rep. No. 414, 92d Cong., 1st Sess. 81 (1971), reprinted in 1972 U.S. Code Cong. & Amin. News 3668, 3747. The

ultimate determination of when an award of attorney fees is "appropriate" was left to the sound discretion of the district courts.

II. THE NINTH CIRCUIT'S IMPORTATION OF A STANDARD EMPLOYED IN CIVIL RIGHTS CASES INTO THE REALM OF ENVIRONMENTAL CITIZEN SUITS IS INAPPROPRIATE BECAUSE OF CLEAR DIFFERENCES IN THE PURPOSES OF THE STATUTES AND IN THE EQUITIES OF CITIZEN SUITS BROUGHT PURSUANT TO THE STATUTES.

In Razore, which was relied on by the courts below, the Ninth Circuit adopted the restrictive standard that is applied in awarding attorneys fees to prevailing defendants under the Civil Rights Act. Razore v. Tulalip Tribes of Washington, 66 F.3d 236, 240 (1995) (adopting the "frivolous, unreasonable, or without foundation" standard applied in a Title VII case in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978)). The Ninth Circuit's importation of a civil rights standard into the realm of environmental citizen suits is inappropriate both because it violates the fundamental rules of statutory interpretation discussed above, and because the equities, policies, and public interest considerations involved in the two kinds of cases differ greatly. The goals of federal environmental and civil rights statutes differ, and the role of plaintiffs in enforcing the statutes differ. Indeed, the dual standard created by the Ninth Circuit in Razore directly contradicts the purposes of the Clean Water Act and CERCLA.

A. The Goals of Civil Rights and Environmental Statutes Differ.

The goals of the two types of statutes differ importantly. Civil rights statutes are intended to stamp out all discrimination against target groups. These statutes reflect a judgment that discrimination of any sort, under any circumstances, is fundamentally wrong and cannot be tolerated. There is no such thing as an amount or type of discriminatory treatment that is a necessary byproduct of a productive economy. Environmental statutes, by contrast, attempt to balance competing, valid needs. They are intended to control the amount of pollution that is a necessary byproduct of economic activity. These statutes set the maximum level of pollution that Congress, through the agencies, determines is acceptable, given society's industrial needs. See S. Rep. No. 414, 92d Cong., 1st Sess. 81 (1971), reprinted in 1972 U.S. Code Cong & Admin. News 3668, 3713 (With respect to setting effluent limitations under the Clean Water Act, stating, "The Committee has included language in this section requiring that in the determination of effluent limitations based on water quality, consideration must be given, on a case-by-case basis, to a balancing of the economic and social costs against the social and economic benefits sought to be obtained"). Not only do most environmental statutes contemplate that some level of pollution is necessary to sustain our industrialized economy; they expressly authorize industry to contribute to this pollution. The amount a particular entity is legally authorized to pollute is set by government-issued permits consistent with the applicable statute and implementing regulations. In fact, the very provision of the Clean Water Act that was at issue here, Section 402, authorizes the issuance of NPDES permits for the discharge of prescribed levels of pollutants. 33 USC § 1342.

One implication of this discrepancy between the goals of civil rights and environmental statutes is that citizen suits play different roles with respect to enforcement of the two types of statutes. Cf. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 418 (1978) (in civil rights cases, "the plaintiff is the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority'") (emphasis added) (citing Newman v. Piggie Park Enter., 390 U.S. 400, 401 (1968), an earlier civil rights case) with Gwaltney of Smithfield, Inc. v. Chesapeake Bay Found., 484 U.S. 49, 60 (1987) (the Clean Water Act citizen suit "is meant to supplement, not supplant, governmental action"). While in the civil rights context the goal is to maximize meritorious citizen suits in order to eradicate discrimination, in the environmental context Congress sought to strike a balance by carefully delineating the role of citizen suits. See Hallstrom v. Tillamook County, 493 U.S. 20, 29 (1989) (legislative history of Resource Conservation and Recovery Act ("RCRA") indicates an intent to strike a balance between encouraging citizen enforcement of environmental regulations and "avoiding burdening the federal courts with excessive numbers of [citizen] suits"). The policies served by the Clean Water Act and CERCLA are "more complex, more measured" than simply maximizing the number of lawsuits brought under those acts. Cf. Fogerty v. Fantasy, Inc., 510 U.S. 517, 526 (1994). Rather, environmental citizen suits are encouraged only to the extent that they attack the type and degree of pollution that Congress has determined is unacceptable, given the need to balance economic activity with environmental protection, and only if they do not intrude on the government's primary responsibility to protect the environment through agency action.

As a result, in the environmental context, not all citizen suits that may otherwise be considered technically meritorious

serve the public interest.[8/] Only those citizen suits that enforce the balance that Congress struck in the Act truly serve the public interest, and the district courts should be allowed to evaluate whether a suit had any public interest component in determining whether to award attorney fees to a prevailing defendant.

For example, Congress has recognized that "citizen suits are proper only if the Federal, State and local agencies fail to exercise their enforcement responsibility." Gwaltney of Smithfield v. Chesapeake Bay Found., 484 U.S. 49, 60 (1987) (quoting S. Rep. No. 92-414, p. 64 (1971), reprinted at 2A Legislative History of the Water Pollution Control Act Amendments of 1972, p. 1482 (1993)). Recognizing that the public interest is not advanced by citizen intrusion into governmental enforcement of the environmental laws, Congress has prohibited citizen suits where a governmental agency is "diligently prosecuting" an action to address alleged violations. 33 U.S.C. § 1365(b) (prohibiting citizen suits under the Clean Water Act where EPA or the state "has commenced and is diligently prosecuting" an action to enforce an effluent limitation under the Clean Water Act); 42 U.S.C. § 9659(d) (prohibiting citizen suits where EPA "has commenced and is diligently prosecuting" an action under CERCLA or under the Solid Waste Disposal Act); see also Gwaltney, 484 U.S. at 376 (recognizing the "potentially intrusive" role of citizens groups where governmental enforcement is underway). Similarly, to ensure that the cleanup of contaminated sites will not be slowed or halted by litigation, Congress has barred citizen suits where a site is subject to an EPA-ordered removal or remedial action under CERCLA. 42 U.S.C. § 9613(h).

[8/] See Walter B. Russell, III & Paul Thomas Gregory, supra note 4, at 355-58.

Moreover, both the Clean Water Act and CERCLA require potential citizen-plaintiffs to give 60 days notice of their intent to sue to an alleged violator as well as to EPA and the state. 33 U.S.C. § 1365(b)(1)(a); 42 U.S.C. § 9659(d). This notice "both allows government agencies to take action and lets the alleged violator cure the violation, either of which would obviate the need for a citizen suit." Atlantic States Legal Found. v. United Musical Instruments, 61 F.3d 473, 476 (6th Cir. 1995) (citing Hallstrom v. Tillamook County, 493 U.S. 20, 29 (1989)). The principle of prohibiting unnecessary citizen suits is also embodied in Section 505(a)(1) of the Clean Water Act, which forecloses citizen suits for "wholly past" violations. Gwaltney, 484 U.S. at 63-64; 33 U.S.C. § 1365(a)(1).

As these provisions demonstrate, Congress was not simply concerned with maximizing the number of citizen suits brought under the Clean Water Act and CERCLA. Rather, Congress sought to encourage only those citizen suits designed to benefit the environment while discouraging lawsuits which will have little to no beneficial effect on the environment. Suits brought merely on principle, those which seek retribution for wholly past violations, and those in which the alleged violation is already being addressed through governmental enforcement were prohibited. This case, which was brought merely on principle for a purely paper violation of the Clean Water Act, where the State of Washington had already prescribed restrictive discharge prohibitions, and where plaintiffs lacked standing because there was absolutely no harm to the environment, is a prime example of an action which, although not patently frivolous according to the district court, does nothing to further the goals of the Clean Water Act or CERCLA. As the district court found:

> This action turned awkward on the eve of trial. It became less of a public interest case after

> plaintiffs abandoned their claim for injunctive relief. As the evidence unfolded, it appeared even less of a public interest case. . . The point of this suit was not to close the Aspen Pond and save the environment. DOE had already done that.

App. C, at 39a. In such a case, the district court should have been allowed to exercise its discretion in determining whether it was appropriate to award attorney fees to Hecla.

B. The Equities of Citizen Suits Brought Pursuant to the Statutes Differ.

In civil rights cases, the equities tend to be clear. An individual plaintiff brings suit against a corporate entity that the plaintiff alleges has discriminated against him. In these cases, relatively unsophisticated an underfunded plaintiffs can "ill afford to litigate their claims against defendants with more resources," Fogerty, 510 U.S. at 524. By contrast, modern day environmental litigation is often initiated by large, sophisticated organizations with significant resources and in-depth knowledge of the law. See Hallstrom v. Tillamook County, 493 U.S. 20, 28 (1989) ("While the initial charge in a Title VII proceeding is normally filed by an aggrieved individual . . . citizen suits under RCRA are like any other lawsuit, generally filed by trained lawyers who are presumed to be aware of statutory requirements."). While many environmental citizen suits are brought by non-profit environmental organizations, these are often, as in this case, well-funded professional organizations. As the district court recognized,

> Plaintiffs are public interest groups, but they are also professional litigants. A Westlaw party search reveals that Atlantic States Legal

> Foundation has been involved in at least 45 actions dating back to 1984. Litigants enjoy no special dispensation from the rules of Federal procedure just because they happen to be professional litigants.

App. C, at 50a.

In addition, more and more frequently in environmental citizen suits, the plaintiff is not an environmental group at all, but rather a for-profit corporate entity seeking to protect its own property or business position. In RCRA and CERCLA citizen suits, for example, the owner of contaminated real property may bring suit against the party that sold it the property or against an adjacent landowner whose operations it contends originated the contamination. See, e.g., Painewebber Income Props. Three Ltd. Partnership v. Mobil Oil Corp., 916 F. Supp. 1239, 1241 (M.D. Fla. 1996) (RCRA suit by landowner against neighboring landowner); Chartrand v. Chrysler Corp., 785 F. Supp. 666, 668 (E.D. Mich. 1992) (RCRA and RICO suit by purchaser of contaminated land against seller of land). Or one corporate entity may bring suit against a competitor under one of the environmental statutes, despite the fact that the plaintiff's motive is to protect its own revenue source, not the environment. See, e.g., Consolidated Edison Co. v. Realty Investments Assocs., 524 F. Supp. 150, 151 (S.D.N.Y. 1981) (Clean Air Act suit brought by electric utility against competing electric utility).

These realities of modern environmental litigation deviate dramatically from the circumstances that led this Court to adopt a strict standard for awarding attorneys fees to prevailing defendants under the civil rights statutes in Christiansburg Garment. See 434 U.S. 412, 421 (1978) (enunciating limited "frivolous, unreasonable, or without

foundation" standard for Title VII cases). In Christiansburg Garment, this Court acknowledged that the plaintiff in civil rights cases is an individual, rather than an organization, and that the individual plaintiff is seeking to enforce - singlehandedly - a Congressional policy of "the highest priority." Id. at 418 (citing Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968)). Nowhere did this Court suggest that its civil rights-specific ruling should be extended to environmental cases. In fact, this Court has acknowledged distinctions between the two types of cases that militate against the blind application of blanket standards to both types. See Hallstrom v. Tillamook County, 493 U.S. 20, 28 (1990). Specifically, given the differing positions that plaintiffs and defendants may have in citizen suits under the Clean Water Act and CERCLA, unlike cases brought under civil rights authorities there is no sound basis for an absolute rule disfavoring recovery of attorney fees by the defendants in these types of cases.

The Ninth Circuit completely ignored these differing equities when enunciating its blanket Razore standard. If, as the plain language of the Clean Water Act and CERCLA direct, the district courts were free to make case-specific determinations of whether an award of fees to a prevailing defendant is appropriate, they could take into account the varying roles of the parties in the litigation and the presence or absence of a genuine public interest component in the case. That approach would promote the goals of these statutes, and produce far more equitable outcomes in attorney fee awards in these cases.

III. THIS COURT SHOULD GRANT THIS PETITION TO ADDRESS THE PROBLEM OF THE LOWER COURTS APPLYING DISPARATE STANDARDS IN AWARDING ATTORNEY FEES TO DEFENDANTS IN ENVIRONMENTAL CITIZEN SUITS.

The issue presented in this case is arising with the increasing frequency of environmental citizen suits nationwide. Unfortunately, the lower courts are applying no uniform standard to the award of attorney fees to prevailing defendants in these suits. The Razore standard is so fully at variance with the plain language of the statute that the courts seem unsure of how to reconcile the two. The result is a multiplicity of ad hoc standards and a needlessly muddied area of the law. Under the circumstances, it is impossible for citizen suit plaintiffs or defendants to divine what standard will apply in a given case. Some courts, such as the Ninth Circuit, blindly apply the Razore "frivolous, unreasonable, or without foundation" standard. See, e.g., Consolidated Edison Co. v. Realty Investments Assocs., L.P., 524 F. Supp. 150, 152-53 (S.D.N.Y. 1981).

Other courts, consistent with the statutory language, apply a discretionary approach, not articulating any formal standard for ruling on a defendant's fee requests, but weighing the facts to determine whether a fee award is appropriate under the circumstances. See, e.g., Sierra Club v. Shell Oil Co., 817 F.2d 1169, 1175 (5th Cir. 1987) (noting, "the court is permitted to award costs of litigation, including attorney and expert witness fees, to any party whenever the court determines such award is appropriate," and upholding district court's award of attorney fees in Clean Water Act case to the prevailing defendant); Pape v. Manistique Papers, Inc., 114 F.3d 1188 (6th Cir. 1997) (table) (in unpublished disposition of RCRA citizen suit, court of appeals approves district court's award of attorney

fees to successful defendant as "appropriate under the circumstances of this case"); Chartrand v. Chrysler Corp., 785 F. Supp. 666, 669 (E.D. Mich. 1992) (in suit brought under both RCRA citizen suit authorization and the Racketeer Influenced and Corrupt Organizations Act, articulating "appropriateness" standard but denying defendant's request for fees, saying, "this Court finds that . . . there has not been any discovery unique to the RCRA claim as opposed to the other legal theories posited by the plaintiffs"); Environmental Compliance Oversight Corp. v. SmithKline Beecham Corp., Civ. A. No. 94-1807, 1994 WL 675297, at 3 (E.D. Pa. Nov. 21, 1994) (in RCRA citizen suit, denying defendant fees under "appropriateness" standard).

Other courts have employed other standards that place various restrictions on fee awards to defendants. See, e.g., Washington Trout v. Scab Rock Feeders, 823 F. Supp. 819, 821 (E.D. Wash. 1993) (in Clean Water Act citizen suit, employing combination of "meritless, groundless, or without foundation" standard and "unreasonably and vexatiously"/ "intent, recklessness, or bad faith" standards to deny defendant attorney fees); PaineWebber Income Props. Three Limited Partnership v. Mobil Oil Corp., 916 F. Supp. 1239, 1244 (M.D. Fla. 1996) (in Resource Conservation and Recovery Act ("RCRA") citizen suit, applying "intent, recklessness, or bad faith" standard and denying defendant fees); National Wildlife Fed. v. Consumers Power Co., 729 F. Supp. 62, 64 (W.D. Mich. 1989) (in Clean Water Act citizen suit, denying defendant fees under "frivolous, meritless, or vexatious" standard); Truck Components Inc. v. Beatrice Co., No. 94 C 3228, 1996 WL 462520, at *12 (N.D. Ill. July 15, 1996) (in citizen suit brought under RCRA and CERCLA, stating that courts should approach defendants' fee requests with "caution" and stating that the Christiansburg standard is "helpful" in determining whether a defendant should be awarded fees).

Given the disparity between the plain language of the "appropriateness" standard contained in the citizen suit provisions of the Clean Water Act, CERCLA, and other environmental statutes, and the Ninth Circuit's blanket "frivolous, harassing, or without foundation" rule, lower court confusion over what standard applies to attorney fee requests by prevailing defendants can only be expected to increase as environmental citizen suits continue to proliferate. This Court should review this case to clarify the appropriate standard for the award of attorney fees to prevailing defendants in this important and unsettled area of the law.

CONCLUSION

Because this petition raises important issues of federal law that the lower courts have been unable to resolve in a uniform manner, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: November 4, 1998

APPENDIX

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WASHINGTON WILDERNESS COALITION, a Washington nonprofit corporation; OKANOGAN HIGHLANDS ALLIANCE, a Washington nonprofit corporation; ATLANTIC STATES LEGAL FOUNDATION, a New York nonprofit corporation,	NOS. 97-35565 & 97-35754
Plaintiffs-Appellants-Cross-Appellees,	D.C. NO. CV-94-00233-FVS
v.	MEMORANDUM*
HECLA MINING COMPANY, a Delaware corporation,	
Defendant-Appellee-Cross-Appellant.	

*/This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the Eastern District of Washington
Fred L. Van Sickle, District Judge, Presiding

Submitted August 4, 1998**
Seattle, Washington

Before: D.W. NELSON, KOZINSKI, and NOONAN, Circuit Judges.

The appellant organizations brought suit against Hecla Mining Company ("Hecla") alleging violations of federal environmental statutes. After a trial before an advisory jury, the district court granted Hecla's motion to dismiss the suit on the ground that the appellants lacked standing. The district court awarded Hecla a portion of its costs bill. The court declined, however, to grant Hecla's motion requesting attorney's fees. We affirm.

The appellant organizations lack standing to bring suit against Hecla. They failed to show that they have suffered any cognizable injury, as required by Lujan v. Defenders of Wildlife,

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**/ The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

504 U.S. 555, 560-61 (1992). The appellants presented only conjectural evidence of a health risk from their drinking water. See id. at 560. They were unable to prove that their interests in fishing or swimming in Mud Lake have been adversely affected by pollutants from Hecla's facility. Moreover, they presented no credible evidence that their aesthetic interests have been compromised. The district court consequently did not clearly err in finding that the appellants suffered no injury. See San Diego County Gun Rights Comm. v. Reno, 98 F.3d 1121, 1124 (9th Cir. 1996).

The appellants also are unable to identify any impropriety on Hecla's part that justifies imposing the punitive measure of denying its bill for costs. See National Info. Servs., Inc. v. TRW, Inc., 51 F.3d 1470, 1472 (9th Cir. 1995). The district court correctly observed that Hecla's motion had a considerably greater chance of success after trial than it would have had before trial. Hecla cannot now be penalized for employing what the court itself regarded as a successful litigation strategy.

Finally, with regard to Hecla's cross-appeal of the district court's decision not to award attorney's fees, we reject Hecla's challenge to the application of the standard articulated in Razore v. Tulalip Tribes of Washington, 66 F.3d 236, 240 (9th Cir. 1995). Razore is the settled law of this circuit, and the appellants offer no compelling reason to revisit it.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

WASHINGTON WILDERNESS COALITION, a Washington Corporation, OKANOGAN HIGHLANDS ALLIANCE, a Washington corporation, and ATLANTIC STATES LEGAL FOUNDATION, INC.,	)	No. CS-94-233-FVS
Plaintiffs,	)	ORDER
vs.	)	
HECLA MINING COMPANY, a Delaware Corporation,	)	
Defendant.	)	

Trial to the bench concluded on April 1, 1997. Michael Axline, Richard A. Smith and Charles M. Tebbutt represented plaintiffs; defendant was represented by Mark Wielga, Scott W. Hardt and Jerry K. Boyd. This Order will memorialize the Court's findings and conclusions. FRCP 52(a).

A. Procedural Background

Plaintiffs are environmental organizations whose representative members are Susan Coleman and Michael Petersen. Defendant Hecla operates mines throughout the northwest and is headquartered in Coeur d'Alene, Idaho. Plaintiffs commenced this action on June 2, 1994 alleging two causes of action. The first claim was brought under Section 301 of the Clean Water Act [CWA], 33 U.S.C. § 1311, and alleges that Hecla is discharging pollutants into navigable waters without a National Pollutant Discharge Elimination System [NPDES] permit. The second claim was brought under the comprehensive Environmental Response Compensation & Liability Act (CERCLA), 42 U.S.C. § 9603(a), which requires a person in charge of a facility to report to the National Response Center any release of a hazardous substance in quantities equal to or greater than allowed by statute as soon as he has knowledge of such a release. Plaintiffs sought penalties and injunctive relief.

On October 21, 1994, the Court denied defendant's motion to dismiss. Washington Wilderness Coalition v. Hecla Mining Co., 870 F. Supp. 983 (E.D. Wn. 1994). On March 8, 1996, the Court denied plaintiffs' motion for summary judgment but significantly narrowed the issues. (**Ct. Rec. 80**). A renewed motion for partial summary judgment followed when plaintiffs discovered a culvert on Hecla's property discharging water which tested positive for pollutants. That motion was denied on January 10, 1997. (**Ct. Rec. 108**). Originally set for jury trial, defendant orally withdrew its jury demand during the hearing on the motion. On March 11, 1997, the Court ruled it would empanel an advisory jury pursuant to FRCP 39(c). On the eve of trial, plaintiffs abandoned the CERCLA claim. Also immediately prior to trial, plaintiffs abandoned their prayer for injunctive relief. The matter proceeded to trial on March 24, 1997 and concluded on April 1, 1997. The advisory jury returned a verdict in favor of plaintiffs in the amount of $295,000.

B. Transactional Background

Hecla's Republic Unit is located several miles north of Republic, Washington and produced gold and silver from the turn of the century forward. During the extraction process, crushed ore is treated with various chemicals including cyanide. Most of the cyanide is recovered, but minute quantities remain in solution when tailings are pumped in slurry form from the mill into a 38 acre impoundment known as Aspen Pond. In addition to ore tailings, Aspen Pond also received wastewater from the mine shafts. Additionally, it receives pumped-back water captured at two seepage collection points.

Aspen Pond is the focal point for geographical orientation. The facility is irregularly oval in shape and covers 38 acres. It is unlined except for the water containment qualities of the tailings themselves. It is undisputed the pond seeps, although the amount of seepage and the degree to which it is recovered and returned is in dispute. One seep ["Aspen Seep"] is located to the south of the pond. A collection system returns seepage

to Aspen Pond from this location. Another ["Unknown Seep"] lies to the east. There is no collection system at this location. Situated to the southeast is former Tailings Pond #1 which was constructed in the late 1930's. It received tailings between 1937 and 1941 when the embankment washed out during a flood. **Ex. M.** The contents flowed down the Eureka Creek drainage and some came to rest as far as six miles below the pond. **Exs. N & O.** With the exception of a portion of the lower embankment, the original boundaries of Tailings Pond #1 can no longer be ascertained. Former Tailings Pond #2 is located to the west of Aspen Pond. It was also constructed in the late 1930's and in use until the early 1960's when it was decommissioned and revegetated. A third seep ["Mud Lake Seep"] is located at its base where water is collected and returned to Aspen Pond.

Plaintiffs allege that all three ponds are sources of water pollution: (1) Aspen Pond because it is leaking into groundwater and from three seep points, one of which finds its

way into Eureka Creek; (2) Pond #1 because although no longer used in mining operations, tailings still remaining after the 1941 flood continue to leach contamination which finds its way into Eureka Creek; and (3) Pond #2 which is seeping into Mud Lake.

Hecla's predecessor-in-interest obtained a Washington State waste discharge permit on August 24, 1971, the year prior to enactment of the CWA. The permit allowed up to 230,000 gallons per day to be discharged to either groundwater or directly into Eureka Creek. **Ex. FF.** On November 1, 1976, a new permit issued which allowed for discharge of up to 274,000 gallons per day to groundwater, but not to surface waters. **Ex. GG.** Hecla acquired the property in 1981. In 1984, Hecla learned the unlined Aspen Pond was responsible for significant discharge into groundwater. **Ex. 8, pages 6-7.** An apparent "smoking gun" was created when a Hecla employee drafted a memo to his supervisor noting the seepage and advising that it might not be wise to confirm this with outside help. The memo

goes on to state "There may even be some merit in not spreading information too widely lest it fall in the wrong hands" **Ex. 7.** This appears to misstate the nature of Hecla's permit. It is apparent that DOE was always under the belief that Aspen Pond would leak and seep. Otherwise, there would have been no point to the terms of the permit allowing discharge of up to 274,000 gallons per day (190 gallons per minute) into groundwater. In any event, wiser heads prevailed and Hecla did not conceal this information as evidenced by the fact that Exhibit 7 was available at trial. Instead, Hecla went forward with hydrological studies performed by outside consultants.

A new permit issued on February 22, 1994. **Ex. HH.** It is not a NPDES permit. The Washington State Department of Ecology [DOE] to which the Environmental Protection Agency has delegated operational authority, will not issue a NPDES permit for discharge to ground water. Rather, it is a zero discharge permit. Nothing is supposed to escape from Aspen Pond, although as a practical matter, DOE was aware when

issuing the permit that seepage had been occurring for years from this unlined pond and would continue to occur so long as tailings were added. **Ex. 5, page 6.** Moreover, it is a closure permit which established a schedule for decommissioning Aspen Pond and building a replacement fourth pond which would employ modern technology designed to eliminate seepage. Effective November 30, 1994, Aspen Pond would be closed.

Litigation followed when Hecla appealed the terms of the permit to the Pollution Control Hearings Board [PCHB]. Kettle Range Conservation Group, an environmental organization, cross-appealed. On May 24, 1994, PCHB denied Hecla's motion for a stay. **Ex. 6.** Prior to the hearing on the merits, Hecla agreed to dismiss its appeal and DOE issued a new permit on December 29, 1994. **Ex. II.** The stipulation for settlement between Hecla and DOE recites that the terms of this permit "are protective of human health and the environment." This was the permit in effect at the time of trial.

DOE knew that overnight compliance was impossible. Hecla was given until July 1, 1995 in which to cease adding tailings to Aspen Pond and until November 30, 1996 to cease discharging mine drainage into the pond. **Ex. II, page 4.** The permit did not provide for a firm closure date, but did require Hecla to submit a closure plan by the end of 1995 and required the company to provide evidence of economic responsibility for the costs of closure within 90 days after DOE approval of the plan. Id. at page 8.

According to the DOE official who issued the permit, Water Quality Section Manager Carl Nuechterlein, Hecla would be "deemed to be in compliance" with the zero discharge requirement so long as it was in actual compliance with the closure schedule. As long as the schedule was maintained, DOE would not take enforcement action. When a permit holder exceeds effluent limitations, it is DOE's common practice to bring the polluter into compliance over a period of time. DOE takes the position that Hecla has all permits required by law.

Certainly it has all the permits available given DOE's policy of not issuing a NPDES permit for discharge to groundwater. According to Mr. Nuechterlein, Hecla has been in substantial compliance with the monitoring and reporting requirements of the permit. Hecla is also in compliance with the closure schedule.

Hecla also has a stormwater permit which covers surface water runoff associated with rainfall or snow melt. This was issued both under NPDES authority and under the State's waste discharge authority. The permit covers the entire Hecla facility except for "stormwater associated with the tailings pond" which, given the date of issuance in 1994, would necessarily mean Aspen Pond because it was the only pond in operation at the time.

C. Issues

> To establish a violation of the CWA's NPDES requirements, plaintiffs must demonstrate that defendants (1) discharged or "added" (2) a pollutant (3) to navigable waters (4) from a point source (5) without a permit.

Beartooth Alliance v. Crown Butte Mines, 904 F. Supp. 1168, 1172 (D Mont. 1995).

(1) Aspen Pond: Pretrial, the Court held that Aspen Pond was a point source as a matter of law. **(Ct. Rec. 80, page 5).** The Court also held that both Eureka Creek and Mud Lake were navigable waters as a matter of law. See Washington Wilderness Coalition, supra, 870 F. Supp. at 989. The Court also held that Aspen Pond was not covered by a current NPDES permit, a matter not in dispute. **(Ct. Rec. 80, page 2).** Nor was Aspen Pond covered by Hecla's stormwater permit. **(Ct. Rec. 108, page 5).** That left very little for trial; i.e., whether Hecla was adding pollutants to either Eureka Creek or Mud Lake through this point source.

(2) Tailings Pond #1: Pretrial, the Court declined to find Tailings Pond #1 to be a point source because the embankment washed out in 1941 and "there is substantial disagreement as to whether it remains a discrete facility." **(Ct. Rec. 80, page 6).** After hearing the evidence, the Court held that the culvert

jutting out of what had previously been the embankment was a point source. The culvert was part of a stormwater collection system designed to channel rain water and snow melt from the area of Tailings Pond #1. **Ex. GG.** Remaining for the finder of fact was whether Hecla was adding pollutants to Eureka Creek through the culvert and if so whether such discharge was covered by the stormwater permit.

(3) Tailings Pond #2: The Court also held that Tailings Pond #2 was a point source as a matter of law. (**Ct. Rec. 80, page 6**). The questions remaining for trial were whether this facility was discharging pollutants into Mud Lake and if so, whether such discharges were covered by the stormwater permit.

D. The Advisory Jury Verdict

The jury was a diverse group, the members of which had no difficulty digesting the evidence and independently forming concrete opinions. At the same time, they were able to achieve consensus. Ordinarily, it would be inappropriate to inquire into

deliberations. People of the Territory of Guam v. Marquez, 963 F.2d 1311, 1315 (9th Cir. 1992). Because the whole purpose of empaneling an advisory jury is to secure advice, it seemed logical to obtain the benefit of the jury's thought processes as well as its bottom line conclusions. Accordingly, an informal but on-the-record discussion with the jury was held post-verdict. Two features were striking.

First, the jury did not accept counsels' presentation of the case in which both sides argued that Aspen Pond, Tailings Pond #1 and Tailings Pond #2 either were or were not discrete point sources. The jury was not instructed on what a point source was, although they heard it defined as the evidence came in. Jurors gave meaning to both words in this term of art and focused on "source" as much as they did on "point." According to the jury, Tailings Pond #2 was not a point source of pollutants despite the fact that pollutants were obviously flowing into Upper Mud Lake at the Mud Lake Seep located at the base of Pond #2. The source, rather, was Aspen Pond

which manifested itself in at least three seeps, two of which were flowing into surface waters. **TR 11-12, 16-17, 21-22.** As to Tailings Pond #1, the jury believed that leaching occurring between the headwaters of the creek and its entry into the culvert might have played some role, but the real culprit was Unknown Seep which ran directly into Eureka Creek, and the source of the seep was Aspen Pond. **TR 3-4, 7-9, 12-13.**

Second, the jury wished to punish and deter Hecla. **TR 28, 30-31.** Hecla knew at least as early as 1984 that seepage was out of control. **Ex. 8, pages 6-7.** One of the company's perceived failings was to disregard the advice of its consultants. **TR 26-27.** The result was not nearly as punishing as it could have been. The penalty assessed for Unknown Seep was $1 per day, or rounded up slightly, $3,000 for the relevant time frame which is substantially less than the $25,000-27,500 per day which could have been assessed. The penalty assessed for Mud Lake Seep was $100 per day, or $292,000 for the relevant time frame. The significance of the jurors' motivation is that they

were not particularly impressed by environmental injury. They would have been had there been environmental injury, but there was none.

This was not Silent Spring. There was no evidence that any living being even sustained inconvenience, let alone injury. There were no bloated fish floating belly-up, no featherless birds, no smells, no defoliation, no loss of habitat and no loss of aesthetics. At worst in the last regard, there was some discharge of iron water characterized by a rusty hue. There was no percipient testimony of any harm to fish or wildlife. Nor was there any expert testimony that there should have been or even might have been such harm. The closest anyone came to espousing this position was when defense aquatic biology and ecology expert John Houghton testified that several samples revealed cyanide levels in excess of Washington State's extremely low ceiling of 5.2 ppb for aquatic life which is below the detection limits employed by the laboratories used by both parties in this case. That was not particularly telling because

neither Mud Lake nor Eureka Creek provide habitat for fish. Mud Lake freezes over in winter and photosynthesis ceases when the ice becomes snow covered. It is probable that in severe winters, the lake freezes solid. These features, coupled with the decaying vegetation covering the bottom of the lake render it anaerobic during the winter. Dr. Houghton was reasonably certain the lake did not currently contain any fish. Eureka Creek does not provide habitat because of physical barriers which prevent upstream migration, the dearth of pooling areas, steep gradient, and the fact that the upper reaches of the creek go dry in mid-summer.

The jury did not see Hecla's discharges as harmful. As one member of the jury put it, "you could still drink the water out of Mud Lake or Eureka Creek and not perish from it. **TR 29.** As another put it, "So as far as the safety of the water and the contaminants in the water, to my mind there was no question that it really wasn't making it hazardous in any way, and there is no concern that in the future there is going to be these terrible

hazards and frogs with four legs and that kind of thing."*** TR 38.

It must be assumed that the jury accepted the testimony of defense ecology experts and particularly that of Hecla's environmental toxology expert, Joyce Tsuji. She testified that EPA drinking water standards assume a constant rate of consumption from a single source over the span of a lifetime. The highest cyanide reading ever obtained in Eureka Creek was 230 times lower than is found in cherry juice which means that drinking 14.5 gallons of Eureka Creek water is equivalent to drinking one cup of cherry juice. Drinking four and one-half gallons of Mud Lake water would yield as much sodium as one can of Campbell's chicken noodle soup. The sodium levels in the area were below that of commercially sold low sodium mineral water. Dr. Tsuji believed the contamination levels were not a threat to human health.

***/Since all normally constituted frogs have four legs, the speaker no doubt meant to say six, eight or any number other than four. The point still comes across.

The jury found technical violations, and being unimpressed with Hecla's responsiveness, imposed a technical penalty of approximately one-fifth of one percent of what could have been imposed. The jury approached the lack of injury with such certainty that it tends to flavor the answer to a question the jury was not asked to answer. If no injury is shown to the flora and fauna of the area, or to those who view and/or interact with the flora and fauna, how can plaintiffs' representatives show injury to themselves?

E. Standing

"Article III limits the jurisdiction of federal courts to 'cases' and 'controversies.'. . . Standing is an essential, core component of the case or controversy requirement." San Diego County Gun Rights v. Reno, 98 F.3d 1121, 1126 (9th Cir. 1996). "An organization can establish standing either by demonstrating that its members suffered injury in fact for which the organization can sue in its representational capacity, or by demonstrating that the organization itself has suffered injury in fact." Heart of

America Northwest v. Westinghouse Hanford Co., 820 F. Supp. 1265, 1270 (E.D. Wn. 1993). Plaintiffs here sue in their representational capacity. "An organization may bring an action on behalf of its members if (1) the individual members would otherwise have standing to sue in their own right; (2) the interests being protected are relevant to the organization's purpose; and (3) the individual members are not required to participate in the law suit." Fund for Animals, Inc. v. Lujan, 962 F.2d 1391, 1396 (9th Cir. 1992). Thus, the issue is whether plaintiffs' members have suffered injury in fact, and more narrowly, whether the representatives who testified at trial have shown injury in fact.

Injury is not a statutory element of a CWA violation. A technical violation of the Act may occur even in the absence of any demonstrable injury. Lack of injury may be a mitigating factor (33 U.S.C. § 1319(d)), but the statute does not require its presence. However, injury is a judge-imposed requirement for any lawsuit because of Article III's case or controversy

requirement. San Diego County Gun Rights Committee, supra, 98 F.3d at 1126.

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" -- an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.' " Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136 (1992) (citations and footnote omitted).

Someone attempting to represent the public interest will generally also have to establish he is representing his own interest as well. As noted by Lujan, "By particularized, we mean that the injury must affect the plaintiff in a personal and individual way." Id. at 560 n.1, 112 S. Ct. at 2136 n.1. The

burden of proof is on the party asserting jurisdiction. Id. at 561, 112 S. Ct. at 2136.

According to plaintiffs, "These injuries need not be large, an 'identifiable trifle' will suffice." Public Int. Research of N.J. v. Powell Duffryn, 913 F.2d 64, 71 (3rd Cir. 1990), cert. denied, 498 U.S. 1109, 111 S. Ct. 1018 (1991), citing United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 93 S. Ct. 2405 (1973). Quoting a treatise, SCRAP observed that "The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation." 412 U.S. at 689 n.14, 93 S. Ct. at 2417 n.14.

One might think it difficult to reconcile the concept of an "identifiable trifle" with a harm that is "concrete and particularized, and actual or imminent, not conjectural or hypothetical" as required by Lujan, supra, 504 U.S. at 560, 112 S. Ct. at 2136 (internal quotation marks omitted). Some courts

have questioned whether SCRAP is consistent with more recent Supreme Court sentiment. "Not only has the Supreme Court itself declared it an outlier, see Lujan v. National Wildlife Federation, 497 U.S. 871, 889, 110 S. Ct. 3177, 3189, 111 L. Ed.2d 695 (1990), but SCRAP was heard on its pleadings, at which point a reviewing court 'presumes that general allegations embrace those specific facts that are necessary to support the claim.' " Florida Audubon Soc. v. Bentsen, 94 F. 3d 658, 672 (D.C. Cir. 1996) (en banc) ; see also, Tanford v. Brand, 883 F. Supp. 1231, 1236 (S.D. Ind. 1995); Oceanport Industries, Inc. v. Wilmington Stevedores, Inc., 636 A.2d 892, 904 n.16 (Del. Supr. 1994) (SCRAP has been "narrowed to the point of invalidation"). An injury need not be "significant," perhaps, but it must be real.

Plaintiffs' representatives assert four bases of injury: (1) loss of use of Mud Lake for swimming and fishing; (2) loss of fishing in the Sanpoil River; (3) generalized concern over

danger to wildlife habitat; and (4) contamination of drinking water in Republic.

(1) Mud Lake: Mr. Petersen lives ten miles north of Republic. He has never used Eureka Creek or Mud Lake for any purpose. He stated he might like to use Mud Lake for swimming but for its reputation as polluted. Ms. Coleman uses Mud Lake for recreational purposes. After peddling her bicycle up the steep hill near the mine site, she enjoys resting at the lake and watching the birds. "And watch the birds and such. So it's a nice, nice little place that a number of people, you know, you see people there all the time sort of enjoying the site."

Ms. Coleman would use Mud Lake for both swimming and fishing but for the perception that the lake is polluted. She was not aware whether there were any fish in Mud Lake. She relayed a hearsay statement that some years ago, local residents ran an aerator to keep the lake open during the winter. That would tend to suggest that the fishing was sufficiently good in times past to justify the practice. But it would also suggest that

now that the practice of keeping the lake open has been abandoned, so have the fish. Ms. Coleman was not aware of any studies about fish in Mud Lake. Neither witness proposed any use for Eureka Creek. Neither was aware of any decline in bird population. Thus, what it comes down to is Mud Lake' s availability for swimming and fishing, assuming the lake has any fish.

These witnesses learned after this litigation was commenced that Mud Lake is on private property belonging to Hecla and could not be used for swimming or fishing without trespassing. Hecla's William Suhr testified he was never asked for permission to use Mud Lake, but would have denied it if asked. Both Ms. Coleman and Mr. Petersen testified they would not trespass. If they were not prepared to trespass, then at most they had an inchoate desire to use the lake if and when Hecla would give them permission to do so. This is slim. One cannot claim injury for being precluded from using another's private property unless some basis exists for a claim of right.

Plaintiffs rely on Orion Corp. v. State, 109 Wn.2d 621, 627, 747 P.2d 1062 (1987), cert. denied, 486 U.S. 1022, 108 S. Ct. 1996 (1988) for the proposition that because navigable waters are subject to the public trust, Hecla could not refuse members of the public access to Mud Lake. Orion in turn relied on Wilbour v. Gallagher, 77 Wn.2d 306, 462 P.2d 232 (1969), cert. denied, 400 U.S. 878, 91 S. Ct. 119 (1970). The holding of Wilbour has little to do with the facts of this case. Wilbour merely stands for the principle that when riparian lands are subject to fluctuations in contiguous lake levels, the public may "follow the water" when the rising levels flood the riparian land. 77 Wn.2d at 314-16.

The public trust doctrine retains validity in Washington. See generally, Orion, supra, 109 Wn.2d at 638-42. "The public trust doctrine resembles 'a covenant running with the land (or lake or marsh or shore) for the benefit of the public and the land's dependent wildlife.'" Id. In the abstract, plaintiffs have an arguable point. Orion holds the door open in dicta for

imposing an access servitude on any lands in which the public may have an interest. In practice, however, research has failed to disclose any reported Washington case which has employed the public trust doctrine to burden a lake front property owner by opening his land to all members of the public who wish to use it.

On the contrary, attempts to apply Wilbour more broadly have not met with success. Harris v. Hylebos Industries, Inc., 81 Wn.2d 770, 784-87, 505 P.2d 457 (1973). The general rule remains that a riparian owner may enjoy exclusive possession of his land and exclude others. Veach v. Culp, 21 Wn. App. 454, 458, 585 P.2d 818 (1978), rev'd on other grounds, 92 Wn. 2d 570, 599 P.2d 526 (1979). The fact that one might have a right to use water does not afford permission to traverse the lands of another to exercise that right. Id. Illustrative is Kemp v. Putnam, 47 Wn.2d 530, 288 P.2d 837 (1955), overruled on other grounds, Save a Valuable Environment (SAVE) v. City of Bothell, 89 Wn.2d 862, 867, 576 P.2d 401 (1978). Holding

that the two streams under consideration were navigable and thus belonged to the State, and that the public could freely use the streams without regard for private ownership rights and subject only to the State's regulation, the court observed as follows:

> The fact that members of the public are entitled to fish the navigable streams in question, of course, does not give them the right to trespass upon the appellant's land in reaching those streams, and the respondent Kemp has not questioned that part of the trial court's order which restrained him from so doing.

Id. at 537.

Assuming that Mud Lake is navigable under Washington law (which it is for CWA purposes under federal law),[****] members of the public might fish or swim in it if they can figure out a way to do so without trespassing on Hecla's lands, but as a practical matter, that is not likely to occur.

[****]/Cf., Kemp, supra, 47 Wn.2d at 533 (Washington test for navigability).

(2) Fishing the Sanpoil: Ms. Coleman fishes in the Sanpoil River some thirty miles below Republic. The river is fed by Granite Creek which in turn is fed by Eureka Creek. She relayed a hearsay statement that the fisheries are in decline. This is too remote to satisfy standing requirements. Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp., 95 F.3d 358, 361-62 (5th Cir. 1996). "Water runs downhill" is a truism. Id. At the same time, it is a trite truism. The record is silent as to how diluted Eureka Creek becomes upon entering Granite Creek and how diluted Granite Creek becomes upon entering the Sanpoil River. Since Eureka Creek water has itself not been shown to be hazardous; i.e., "you could still drink the water. . . and not perish from it," it would take a substantial leap of faith to conclude that events transpiring thirty miles away are fairly traceable to Hecla's discharges.

(3) Generalized concern: Mr. Petersen expressed a generalized concern for the future of plants and wildlife. This is precisely the sort of interest no longer cognizable after Lujan.

(4) Republic water: Mr. Petersen spends some time in Republic on business and when there drinks the water. Ms. Coleman works in Republic and drinks the water on a daily basis. Both are concerned that the city wells may become affected as time p[illegible]ses. The evidence reflected no scientific hydrological link between the Republic wells located near the confluence of Granite Creek and the Sanpoil River other than the fact that water flows downhill. The only evidence of a hydrological nexus was to the contrary; i.e., that ground faults prevent Eureka Creek water from migrating to the well site. **Ex. RR.**[*****] Moreover, testing of the Republic wells has shown that with a single exception, city water meets water

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[*****]/This evidence is weak. No expert testified to this at trial. Exhibit RR is a letter from a Hecla unit manager dated November 4, 1994 urging that DOE need not be concerned about the Republic wells because of the lack of a hydrological connection with the Hecla facility. The author does not disclose the basis of his knowledge. DOE apparently did not accept this position because the December 1994 permit continued to require monitoring of the Republic wells. Mr. Nuechterlein disclaimed any knowledge of the technical aspects of the exhibit, but testified that DOE wanted more data before eliminating the monitoring requirement. TR 932. Weak or not, Exhibit RR is the only evidence in the case touching upon the issue.

quality standards. **Exs. RR, SS.** The single exception is that in 1993, one well reflected an excess of iron. **Ex. SS.** This phenomenon did not recur when the well was retested in 1994. **Ex. RR.** This is mineral rich country, and nothing in the evidence ties an excess of iron to Hecla's discrete facility. Moreover, Dr. Tsuji explained that the excessive iron indicated a "secondary maximum contaminant level" meaning that "it's not based on health, it's based on taste or color or staining or other such properties."

A concern over the safety of the public water supply is not an idle concern. This is what prompted DOE to take the closure action and to require Hecla to monitor the Republic wells as a condition of issuing the 1994 permit. In today's society, it is no longer a tolerable approach to adopt a wait-and-see attitude in such matters. By the time a hydrological link is proven by the presence of pollutants in the public water supply, the damage has been done.

However, saying that DOE may have had grounds to be concerned over the future of Republic's water supply and to require investigative testing to confirm or refute the possibility of harm is not the same as saying that every resident of the Republic area would be able to show actual or imminent injury. The fact that DOE placed Hecla under a closure order in February 1994 with tailings barred from the pond by November of that year, and imposed strict monitoring requirements and contaminant level ceilings in the interim, would strongly suggest that in June 1994 when this suit was commenced, future harm was most unlikely.[******] Not only was the closure order in place, but PCHB had already denied Hecla's application for a stay on May 24, 1994. As a practical matter, denial of the stay went a long way toward resolving the merits because the merits could not have been reached very far in advance of the November

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[******]/The December 1994 permit which issued after the stipulation for dismissal of the appeal was reached extended the deadline from November 1994 to July 1995. For jurisdictional purposes, the relevant facts are those existing when the complaint was filed. Didrickson v. U.S. Dept. of Interior, 982 F.2d 1332, 1339 (9th Cir. 1992).

1994 closure date. This issue fails both the injury and traceability prongs of Lujan.

Because plaintiffs, through their representative members, have demonstrated no particularized injury affecting them in a personal and individual way as required by Lujan, supra they have not carried their burden of establishing standing. With respect to the Republic wells and the Sanpoil River, even assuming injury were shown in some theoretical sense, plaintiffs have not demonstrated traceability.

IT IS HEREBY ORDERED:

This action is DISMISSED for lack of standing.

IT IS SO ORDERED. The District Executive is hereby directed to enter this Order, enter judgment thereon, furnish copies to counsel and close this file.

DATED this 8th day of May 1997.

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

NO. CS 94-233-FVS

WASHINGTON WILDERNESS COALITION, a Washington Corporation, OKANOGAN HIGHLANDS ALLIANCE, a Washington corporation, and ATLANTIC STATES LEGAL FOUNDATION, INC.,	)	NO. CS 94-233-FVS
Plaintiffs,	)	ORDER
vs.	)	
HECLA MINING COMPANY, a Delaware Corporation,	)	
Defendant.	)	

BEFORE THE COURT are defendant's Motion for Fees and Costs and plaintiffs' Motions to Stay and to Retax Costs. Michael Axline, Richard A. Smith and Charles M. Tebbutt represent plaintiffs; defendant is represented by Mark Wielga.

Scott W. Hardt and Jerry K. Boyd. This Order will memorialize the Court's rulings.

Background

After trial to the bench with an advisory jury, the Court entered findings and conclusions on May 7, 1997 and held that plaintiffs' representatives failed to demonstrate particularized injury and plaintiffs thus lacked derivative standing. Plaintiffs made no effort to establish organizational standing. Accordingly, the action was dismissed for lack of jurisdiction. Defendant's motion for fees and costs followed as did plaintiffs' motion to retax costs. Plaintiffs also seek a stay pending appeal.

This action turned awkward on the eve of trial. It became less of a public interest case after plaintiffs abandoned their claim for injunctive relief. As the evidence unfolded, it appeared even less of a public interest case. Hecla was effectively out of business the day PCHB denied its request for a stay. That occurred prior to suit being filed. Although DOE relaxed its grip in December 1994 by allowing Hecla additional

time in which to operate and effect closure, that was not the situation in June 1994 when suit was commenced. At that time, Aspen Pond was scheduled to close in five months and would be closely monitored in the interim with new restrictions on contaminant levels. The point of this suit was not to close Aspen Pond and save the environment. DOE had already done that.

One would have to stop short of saying, as does Hecla, that the action was never a public interest case at all. Public benefit extrinsic to the case actually being litigated may accrue when actual or potential polluters realize that if they do not watch their ways, they may be facing similar litigation in the future. Deterrence is a legitimate function of a CWA action, and for reasons to be addressed, Hecla may be in need of deterrence.

Analysis

(A) Motion to stay: Judicial economy would best be served by reaching these matters while the facts are fresh in mind.

(B) Motion for fees.

(1) CWA claim: A prevailing defendant may seek fees and costs under the CWA.

> The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate.

33 U.S.C. § 1365(d).

To be entitled, a successful plaintiff need only prevail on a significant point in contention. "All that is necessary is that '(1) as a factual matter, the relief sought by the lawsuit was in fact obtained as a result of having brought the action, and (2) there was a legal basis for the plaintiffs' claim.' " Idaho Conservation League, Inc. v. Russell, 946 F.2d 717, 719 (9th Cir. 1991) (citation omitted). The standard under which a prevailing defendant may obtain fees and costs is more onerous. Razore v. Tulalip Tribes of Washington, 66 F.3d 236, 240 (9th Cir. 1995). Razore borrowed the standard set out in Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421, 98 S. Ct. 694, 700

(1978), a Title VII case. A prevailing defendant will be entitled to fees only if "plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." 66 F.3d at 240.

The existence of Unknown Seep was uncontroverted. Plaintiffs' expert John Monks observed it flowing into Eureka Creek. **TR 63.** Defense expert Douglas Frick agreed with this observation, although he disagreed that the source was Aspen Pond. **TR 640.** It was Aspen Pond. Given the constituency of chemicals flowing from the seep,******* there is no other explanation. Plaintiffs proved a CWA violation. Unknown Seep was an unpermitted point source discharging pollutants to navigable waters of the United States. That is all which is required. Beartooth Alliance v. Crown Butte Mines, 904 F.

*******/The advisory jury focused on cyanide as a signature chemical because while other contaminants may occur naturally in this mineral rich area, cyanide can be attributed only to mining operations. Cyanide occurs in nature; e.g., apricot pits, but no one pointed to an apricot orchard at the Republic Unit. The water-runs-downhill axiom has its limitations, but Aspen Pond is the only conceivable source of the cyanide.

Supp. 1168, 1172 (D. Mopt. 1995). Where plaintiffs failed was in not establishing standing. Congress does not take CWA violations lightly as evidenced by the stout statutory per-day penalties. When a party makes out a factual case and fails only in its jurisdictional case, it is difficult to characterize the claim as frivolous or unreasonable or without foundation.

Hecla points to authority holding that a prevailing defendant may be awarded fees under the Christianburg standard even if the claim is dismissed on jurisdictional grounds. Elks Nat. Foundation v. Weber, 942 F.2d 1480, 1485 (9th Cir. 1991), cert. denied, 505 U.S. 1206, 112 S. Ct. 2995 (1992). Weber is distinguishable. In Weber, plaintiffs were litigants in state court proceedings involving rights in an oil lease. Dissatisfied with the decision of the state supreme court, they filed a § 1983 action in federal court naming the members of the court and seeking declaratory and injunctive relief. Id. at 1483. What they should have done, of course, is petition the United States Supreme Court for certiorari because that is the only

court with authority to review decisions of the States' highest courts. Id. There is no such thing as "horizontal review" except, perhaps, in the habeas context. This principle was settled when the federal action was filed. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 486, 103 S. Ct. 1303, 1317 (1983). This was a major mistake of law which rendered the action frivolous. A reasonable attorney would not sue the members of a state supreme court for doing no more than "erroneously" construing the state's domestic contract law. When the trial court dismissed the action, it awarded fees alternatively under 42 U.S.C. § 1988 and FRCP 11. 942 F.2d at 1483. The first basis is compensatory, but the latter is punitive.

Here, the mistake was one of fact. Pursuant to FRCP 11(b), plaintiffs certified that "to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances:"

> Defendant's violation of the CWA and CERCLA have adversely impacted the plaintiffs' ability to use and enjoy these areas and have injured plaintiffs' health, recreational, environmental, and aesthetic interests.

Complaint at ¶ 11.

These representations were not borne out at trial. There was no testimony that aesthetic values were harmed. There was evidence that health interests were a concern. Certainly they were. That is what prompted DOE's action in laying that concern to rest by closing Aspen Pond. But there was no evidence that plaintiffs' representatives personally suffered injury to their health or faced any scientifically sustainable risk that they would. There was evidence plaintiffs' representatives had "environmental" concerns. Everyone does, but this is not the sort of particularized harm the case law requires. Finally, there was testimony that recreational interests were harmed. To exercise that interest, however, would require plaintiffs' representatives to become trespassers.

It is true that standing is an integral component of every action brought in the federal system. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 2136 (1992). This might be a different case if Hecla had brought and prevailed on a pretrial motion challenging standing, but defendant apparently believed trial was required to reach the issue. In the end, plaintiffs' proof fell short, but that is not the same as saying the outcome was so manifestly preordained as to cause the action to be frivolous, unreasonable or without foundation.

(2) CERCLA: Fees and costs are also available under CERCLA.

> The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate.

42 U.S.C. § 9659(f).

The parties do not cite, and independent research has not revealed, any decision in which a prevailing defendant has been awarded fees under this section. However, § 9659(f) is word-for-word identical to § 1365(d). Given this same wording, and the parallel goals of CWA and CERCLA, it is probable the Ninth Circuit would apply the same analysis it did in Razore. See ASLF v. Onondaga Dept. of Drainage and Sanitation, 899 F. Supp. 84, 87 (N.D. N.Y. 1995).

Plaintiffs' case rested largely on the premise that dissociated sodium ions which were at one time a constituent of sodium cyanide are subject to the same reporting requirements as the parent compound. This view was not without support. In re Tri-State Mint, Inc., 1994 WL 157571 (E.P.A. 1994). In denying plaintiffs' motion for summary judgment, the Court did not reach the legal question, reserving it until the evidence was in. It would be for the finder of fact to determine whether the chemical at issue was harmless basic sodium and hence not reportable or a dissociated form of a reportable substance. If

the latter, it would then be for the Court to decide whether to adopt Tri-State Mint. Tri-State Mint is weak when applied here, both because of the decision's a priori reasoning and the observation that unlike the fact pattern in Tri-State Mint, it is probably not scientifically possible under the facts of this case to say where the sodium ions originated. Nonetheless, it was authority.

In an analogous vein, the Ninth Circuit has counseled against moving precipitously when a litigant has at least a toe hold on the law:

> NMEC also sought indemnification for Riverhead's RICO claims. Case law, here also, does not so clearly bar NMEC's claims as to warrant sanctions. While courts have held that there is no right to indemnification or contribution (partial equitable indemnification) under RICO. . . . neither the 9th Circuit nor the Supreme Court have disposed of the issue. With no higher court ruling, it certainly would not violate Rule 11 for NMEC to argue that such a right existed.

Riverhead Sav. Bank v. National Mortgage Equity Corp., 893 F.2d 1109, 1117 n.2 (9th Cir. 1990) (citations omitted).

That is a broad statement, and possibly broader than the Riverhead panel intended. It cannot be that the Court was suggesting that a position which is manifestly frivolous, disclaimed by every hornbook writer and contrary to the established law of every other circuit becomes less frivolous merely because no litigant has ever before had the temerity to present the argument to the Ninth Circuit. Be that as it may, the above-quoted passage counsels against penalizing a litigant for exercising creativity. The evolution of the law would grind to a halt were that the result. Plaintiffs' CERCLA claim was weak when brought and weaker still after entry of the order on summary judgment, but it was not frivolous, unreasonable, or without foundation.

(C) Motion to retax costs: The Clerk denied almost 90% of Hecla's cost bill and awarded only $2,670 of the $21,404 requested. Plaintiffs seek total disallowance of costs on two grounds: (1) Hecla incurred the costs of trial unnecessarily because standing should have been challenged by pretrial

motion; and (2) plaintiffs are public interest groups who serve as private attorneys general and costs should not be assessed so long as an action is brought in good faith.

(1) Costs unnecessarily incurred: Hecla knew all it was going to know about its standing case upon deposing plaintiffs' representatives. The question is whether the defense could have effectively made a motion at that time. The motion could have been made, and it might have been successful, but success was not certain. The key to the representatives' asserted injury was whether there was injury to anything.

> If no injury is shown to the flora and fauna of the area, or to those who view and/or interact with the flora and fauna, how can plaintiffs' representatives show injury to themselves?

(Ct. Rec. 152, page 12).

Predictably, if faced with the motion, plaintiffs would have pointed to well contamination, loss of habitat, loss of fishing and loss of recreational opportunities. It would have been necessary to try the entire case on paper; something courts do

not do when credibility enters into the picture. Hecla may have had strategy in mind independent of the likelihood of success on the motion, but after hearing the case live, it seems improbable that a motion would have been as effective as was trial.

(2) Public interest: Plaintiffs are public interest groups, but they are also professional litigants. A Westlaw party search reveals that Atlantic States Legal Foundation has been involved in at least 45 actions dating back to 1984. Litigants enjoy no special dispensation from the rules of federal procedure just because they happen to be professional litigants. The rule in this Circuit is that costs are awarded as a matter of course and are denied only if the prevailing party has done something culpable which merits sanctions. National Information Services, Inc. v. TRW, Inc., 51 F.3d 1470, 1472-73 (9th Cir. 1995). Hecla did nothing worthy of punishment.

A court cannot deny properly claimed costs without stating a reason. Id. at 1472; accord, Zenith Ins. Co. v. Breslaw, 108 F.3d 205, 207 (9th Cir. 1997). No such reasons come to mind

and plaintiffs advance none relative to Hecla's culpability other than to assert that a pretrial motion on the standing issue should have been brought. This Circuit has rejected plaintiffs' contention that the losing party's good faith insulates it from paying costs. National Information, supra, 51 F.3d at 1472; accord, Zenith, supra, 108 F.3d at 207. The system expects good faith on the part of all litigants as a matter of course. National Information, supra, 51 F.3d at 1472. The inquiry is not what the losing party has done right, but what the prevailing party has done wrong.

IT IS HEREBY ORDERED:

(1) Plaintiffs' Motion to Stay (**Ct. Rec. 159**) is DENIED.

(2) Defendant's Motion for Fees and Costs (**Ct. Rec. 154**) is DENIED.

(3) Plaintiff's Motion to Retax Costs (**Ct. Rec. 172**) is DENIED.

IT IS SO ORDERED. The District Executive is hereby directed to enter this Order and furnish copies to counsel.

DATED this 9th day of July 1997.